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## **Making the best out of the Copyright in the Digital Single Market Directive: An overview of implementation opportunities and risks**



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## Introduction

This document provides a high level analysis of the risks and opportunities created by the National implementations of [Directive \(EU\) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market](#) (hereafter “DSM Directive”). This Directive was adopted in April 2019 and Member States have until 6 June 2021 to implement the provisions contained in the Directive.

This analysis focuses on the provisions that are directly relevant to the education, research and cultural heritage sectors. This includes exceptions and limitations to copyright that have these institutions as beneficiaries and which are discussed in Part 1. Part 2 of the analysis focused on two other provisions that are either relevant to public interest organisations (Article 14 on the protection of the public domain) or that have been especially controversial and are likely to have a significant impact on how the public interacts with copyrighted works online (Article 17). The final section of this document summarizes the analysis and the recommendations made throughout the analysis.

For each of the provisions discussed in this Directive a summary of the provision and its context is provided. This is followed by a list of issues where implementation by the Member states can significantly impact the scope and usefulness of the provision in question. **It is important to note that this document does not provide implementation guidelines<sup>1</sup>, but rather identifies issues that are relevant for ensuring that implementations of the Directive provide maximum benefit to public interest organisations and the public at large**

This also means that this analysis has been authored with a specific objective in mind: to leverage the implementation of the DSM Directive to maximise the room that institutions in the education, research and cultural heritage sectors (and their users) have when operating in the digital environment. Given this objective this analysis does not limit itself to a literal transposition of the Directive, but also identifies opportunities for member states to go beyond what the Directive requires them to do.

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<sup>1</sup> Such guidelines are currently being worked on by a number of civil society organisations including COMMUNIA and library organisations such as IFLA, EBLIDA and LIBER.

## Implementing the DSM Directive

The EU Member States<sup>2</sup> have 2 years to implement the provisions laid down in the DSM Directive. The Directive supplements a number of existing EU Directives in the field of copyright law, most importantly [Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society](#) (hereafter “InfoSoc Directive”). member states have traditionally implemented the EU Directives in the field of copyright in various ways. Some unified acts that cover all types of rights while others have different acts for different types of rights (copyright, related rights, database rights, ect). As a result some member states may implement the Directive all at once, while others may implement different parts of the Directive separately<sup>3</sup>. It can be expected that most member states will implement the provisions contained in the Directive by adapting and expanding existing legislation (most importantly their copyright acts). This also means that legislative processes aimed at implementing the Directive in the Member states provide an opportunity to include additional changes to the existing national copyright rules (as long as such changes stay within the legislative scope that is provided by the InfoSoc Directive). This fact is explicitly acknowledged by [Article 25 of the Directive](#).

One of the main legislative objectives of the DSM Directive was to further harmonize the EU copyright rules between the member states. While the effort to harmonize stayed well behind what civil society organisations, academics and progressive politicians have advocated for, the objective to harmonize is reflected throughout the Directive. Most of the provisions in the Directive are mandatory for member states to implement<sup>4</sup> and there is relatively little room for member states to make substantive choices or deviate from the text of the provisions. However there are still substantive choices that can be made by the Member States when implementing the Directive.

Another (relatively novel) element of the Directive is that it leaves some specific implementation questions to be determined by stakeholder through a number of stakeholder dialogues both on the European (Article 17) and on the Member State level (Articles 3 and

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<sup>2</sup> In this document Member States is understood to include the EEA countries that will also need to implement the provisions contained in the Directive.

<sup>3</sup> France for example has already implemented Article 15 of the Directive in a separate law that came into force on the 24th of october 2019 (“[LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse](#)”)

<sup>4</sup> The only optional provision is Article 12 which deals with Extended Collective Licensing and was included during the trilogue negotiations at the request of the Council.

10). This means that stakeholders such as organisations from the education, research and cultural heritage sectors have some ability to directly participate in shaping elements of the national. Implementations.

## Part 1: Exceptions and Limitations

Title II of the DSM Directive introduces a number of new and mandatory exceptions and limitations to copyright. This concerns exceptions to enable Text and Data Mining (TDM) of copyrighted works (Articles 3 and 4), an exception allowing the use of protected works in digital and cross-border teaching activities (Article 5) and an exception allowing the preservation of cultural heritage works by cultural heritage institutions (Article 6). In addition, Article 8(2) of the Directive also introduces a mandatory exception that allows cultural heritage institutions to make Out Of Commerce Works (OCCW) contained in their collections available online unless there is a way to secure permission to do so via collective licensing. In total the Directive introduces 5 new mandatory exceptions that will need to be implemented in each Member State. The Commission's original proposal only contained three of these exceptions and the addition of two additional exceptions benefitting research and cultural heritage institutions should be seen as a success of the advocacy efforts by these sectors.

In a clear departure from the InfSoc Directive all of these new exceptions are mandatory (they have to be implemented by the Member States) and (with the exception of the OCCW exception) they are also protected from contractual and technological overrides. This reflects the legislators motivation to focus on cross border uses in the digital environment.

Member states will need to implement these exceptions in addition to already existing national exceptions that are based on the InfoSoc Directive and the Orphan Works Directive. The 2001 Orphan works Directive contained 20 optional exceptions and left it up to Member States to decide which of these they wanted to implement in their national laws. As a result there are significant variations between the Member States when it comes to the implementation of the InfoSoc exceptions<sup>5</sup>. While the DSM Directive does very little<sup>6</sup> to remedy the resulting patchwork nature of user rights in the European Union, the Member States can - and should - use the national implementation of the DSM Directive to implement additional InfoSoc exceptions which would contribute to further harmonization. While the Directive does not require them to do this, Article 25 of the Directive makes it explicit that nothing in the DSM Directive prevents them from doing so.

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<sup>5</sup> See [copyrightexceptions.eu](http://copyrightexceptions.eu) for an overview. This website created by the Dutch NGO Kennisland in 2014 tracks the implementation of the InfoSoc exception for each member state. It is currently not actively maintained and some of the information is likely outdated, but it is still illustrative of the patchwork nature rights that users enjoy in the EU (Disclosure: The author of this analysis was Director of Kennisland at the time when the site was launched and in that position initiated the website.)

<sup>6</sup> Article 17(7) make the existing Parody and Quotation exceptions de facto mandatory for all Member States. This is discussed in more detail in Part 2 of this analysis

**The exceptions introduced by the DSM Directive, together with the possibility to implement more of the existing InfoSoc exceptions constitute a substantial improvement of the position of research, educational and cultural heritage institutions and by extension the millions of their users.**

In the following sections each of these exceptions is examined in greater detail.

### **Article 3 and 4 on Text and Data Mining**

Big data analytics is increasingly ubiquitous, and is used by many different players from large companies, individuals through to the research sector. The core of Big data analytics, which is also one of the fundamental facets of Artificial Intelligence (AI), is the ability for computers to analyse and extract information from structured and unstructured datasets. This process is often referred to as “Text and Data Mining” in a legal context, or more widely as “data analytics”.

Given the ubiquity of Text and Data Mining, particularly in the US (which shows significantly higher exploitation levels of data than in Europe), for reasons of international competitiveness the Commission decided in 2016 to introduce a new copyright exception allowing EU based research organisations to engage in Text and Data Mining for scientific purposes without having to obtain permission from rightsholders to do so. During the legislative discussion of the DSM Directive proposal an additional exception allowing Text and Data Mining by everyone under certain conditions was added to the text of the Directive<sup>7</sup>.

[Article 2.2](#) of the DSM Directive defines Text and Data Mining (TDM) as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.”

- [Article 3](#) (Text and Data Mining for the Purposes of Scientific Research) requires member states to introduce a mandatory exception to copyright<sup>8</sup> in their national laws for the purposes of data analytics. This new exception gives **researchers** who have legal access to the open web as well as the collections of universities, libraries, archives and other cultural heritage organisations across the EU, the freedom to engage in Text and Data Mining **for scientific purposes** without requiring permission

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<sup>7</sup> The additional exception was added in response to amendments proposed by both the Council and the European Parliament.

<sup>8</sup> In this document the term term copyright(s) is used to mean both copyright and related (neighbouring) rights in copyright law, including *sui generis* database rights.

from rightsholders. Member states are encouraged to meet with research organisations, cultural heritage organisations and rightsholders to discuss appropriate security measures relating to the exercise of the exception. The right to enjoy this new exception cannot be removed by either contract or by technical protection measures.

- [Article 4](#) (General exception for Text and Data Mining) requires member states to introduce a mandatory exception to copyright in their national laws for the purposes of Text and Data Mining **by anyone** who wishes to mine materials subject to copyright **for any purpose**. Rightsholders however can prevent data mining under this exception if they so choose.

The main difference between the two exceptions is that the research exception (Article 3) allows researchers affiliated to public interest organisations to keep a copy of the information they mined, and this cannot be prevented by contract or technical protection measures. The second exception (Article 4), which can be enjoyed by anyone, only allows Text and Data Mining to be performed on content for which rights holders have not expressly reserved their this right.

These two new mandatory exceptions have the potential to support big data analytics and artificial intelligence (AI) in Europe. The exceptions are relatively straightforward. However a poor of a number of important details into national law could severely hamper the ability of beneficiaries of the exceptions to undertake Text and Data Mining. This concerns the following issues:

### **Rapid TPM removal**

Technical Protection Measures<sup>9</sup> (short TPMs not to be confused with TDM) preventing Text and Data Mining remain an area of very real outstanding concern. This can range from basic technical features such as captcha technology that can frustrate mining, through to more sophisticated technical protection measures. For example scholarly publishers use systems that not infrequently end up blocking access to databases that universities have paid a subscription for. Often what publishers are doing is monitoring download rates and if their systems are alerted to atypical download / request / load rates they may assume that part of the

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<sup>9</sup> Technical protection measures (TPMs) refer to locks, marks or other tools (e.g. password control systems, payment systems, time access controls, encryption measures, captcha technology, etc.) that control access to and/or what a user can do with a digital work, such as a book, video or any another file type.



university technical infrastructure has been compromised and will cut off access. Both TDM exceptions are covered by [Article 7](#), which specifies that Member States must not give legal protection to Technological Protection Measures (TPMs) that would prevent beneficiaries from exercising their rights under these exceptions and requires rightholders to remove TPMs where they conflict with the exercise of the rights granted under these exceptions. Unfortunately the Directive provides little clarity about the process to be followed in order to remove these.

The Directive underlines that rightholders should, first of all, be given the possibility to remove technological protection measures that prevent enjoyment of the exception. This could be problematic if it leads to long delays for researchers engaging in TDM, with a need to apply for voluntary changes each time a TPM is encountered. It will be important to ensure that such a process is quick and simple in order to ensure that beneficiaries of the TDM exceptions do not face unreasonable delays. **To achieve this goal, Member States should stipulate that TPMs have to be removed by the rightholders within 72 hours after a request (See also the separate section on Article 7 below).**

### **Data storage**

The Directive refers to the secure storage of content used for Text and Data Mining. Despite efforts by rightholders during the discussions in the European parliament to oblige the deletion of datasets created in the course of Text and Data Mining (which runs entirely contrary to all scientific practice) Article 3(2) only refers to storing datasets “with an appropriate level of security”. It does not prescribe in any detail what this should mean. Recital 15 however suggests Member States discuss it, including using trusted intermediaries for storage. **From the perspective of research institutions and researchers it would be inappropriate for any detailed or technological expression of security measures to be imposed on researchers. Member States should refrain from imposing any specific or more onerous storage obligations than common sense dictates on these institutions.**

### **Robots.txt**

[Article 4\(3\)](#) of the Directive specifies that rightholders who want to exclude their works from the scope of the general TDM exception can do so by expressly reserving their rights “in an appropriate manner, such as machine-readable means in the case of content made publicly available online”. The requirement that such reservations are made in a machine readable way

is welcome, but insufficient. **For this provision to be effective (both for rightholders wishing to reserve their rights and for beneficiaries wishing to respect such reservations) such reservations need to be made in a standardized way. While the text of the Directive leaves the further implementation of this provision to the individual member states, a standardized way of expressing the rights reservation must be established on the European level to prevent the risk that Member States adopt different standards. This means that the European Commission must actively work with all relevant stakeholders and the Member States to determine a standard for machine readable rights reservations.** The most obvious candidate for this is the [Robots Exclusion Standard](#) which is adhered to by the largest Text and Data Mining operations on the internet, including Google, Bing, Baidu, DuckDuckGo, Yahoo!, and Yandex. Due to the search engines commitment to follow these rules, nearly all websites on the planet are following the standard to control what can be mined by their bots and can easily be used to express the type of reservation foreseen in Article 4(3).

### **Implementation outlook**

Big data analytics is an activity with a substantial economic impact and during the legislative procedure the (scientific) publishing sector has aggressively sought to protect its economic interests in this area. While the issues discussed above are mainly of a technical nature, they will have a big impact on the usefulness of the TDM provisions introduced by the Directive. It is therefore likely that publishers and other rightholders will seek to influence the national implementation in these areas and as a result the academic research community will need to closely monitor the national implementations and seek representation in the stakeholder consultations foreseen by Article 3(4).

### **Article 5 online education**

Currently, the educational exceptions do not work the same way in every EU country. This is because the existing InfoSoc Directive only gives Member States the option to implement in their national laws a copyright exception or limitation for educational purposes ([Article 5\(3\)\(a\) InfoSoc Directive](#)). Because this is an option, and not an obligation, some EU countries simply have no educational exceptions, while others have only narrow exceptions that do not align with the daily needs of teachers (e.g. where a teacher would be forbidden from showing a Youtube video in class) and students (e.g. where students cannot include more than a snippet of an image in their assignments).

The fact that the existing educational exceptions are so different from country to country creates legal uncertainty for teachers, promotes inequality among students and severely limits digital and online activities as well as cross-border collaboration. The DSM Directive attempts to harmonize this fragmented legal landscape, by requiring Member States to implement in their laws the same minimum set of rights for digital and cross-border teaching activities.

[Article 5 of the Directive](#) makes it mandatory for Member States to introduce in their national laws an educational exception giving educators and learners at educational institutions the freedom to use copyrighted materials in digital and cross-border teaching and learning activities.

This mandatory educational exception allows educators and learners, in a formal education setting, to make certain digital uses (e.g. scanning, uploading, streaming) of copyrighted materials (e.g. images, text, video) without having to ask permission to copyright owners beforehand, provided that they respect the conditions defined in Article 5.

Unfortunately Article 5 also contains three optional provisions that allow Member States to restrict the benefits created by the exception via their national implementations:

- Recital 21 has the potential to fragment the exception across the EU, by introducing the option that each country can define the extent to which a piece of content can be used (e.g. 5% of a textbook or video in country A, 15% of a textbook or video in country B); and
- [Article 5\(2\)](#) provides Member States with the option to take away the educators and the learners right to use a certain piece of content under the exception as soon as copyright owners start selling licences for said content.
- Article 5(4) provides Member States with the option to “provide for fair compensation for rightholders” for the uses made under the exception

As a result Article 5 leaves a lot of room for Member States to implement the exception. From the perspective of educational institutions a full implementation that does not make use of any of the above mentioned harmful options would be the minimum acceptable implementation scenario. Member states who want to create maximum space for educational uses of copyrighted works should also consider making full use of the policy space offered under the existing educational exception from the ecommerce Directive.

## **No Licensing override**

Article 5(2) provides Member States with the option to implement the exception in such a way that it does not apply whenever there are suitable licenses available in the market that authorise the same uses as those allowed under the license. This would result in a situation where right holders can override the exception by offering licenses to educational institutions. This means that a teacher's or student's ability to benefit from the exception can be taken away by unilateral actions of rightholders, negating the effectiveness of the exception. Users will be denied the right to make uses under the exception, and would be forced to buy licenses for those uses. The licenses might not be subject to negotiation, might be disadvantageous for education institutions in terms of added costs, added bureaucracy, surveillance or uncertainty about the conditions attached to licenses. Given this it must be a priority to prevent all Member States from implementing the licensing override option in their national laws. This is not only important in the context of the educational activities covered by the license but also with an eye to the overall copyright system. User rights should not be conditional on the commercial motivations of rightholders and the licensing override mechanism introduced by Article 5(2) is setting a very dangerous precedent here.

## **No quantitative limitations**

As a rule, an educational exception only allows the uses of parts of works, but if it is an image or a short poem, then it can be used in its entirety. From the perspective of educational institutions it is important to let practice (and in cases of conflict: court decisions) define what is right. The 3-step test enshrined in the InfoSoc Directive gives the flexibility users need in any given situation, while protecting the interests of copyright owners. Defining percentages (e.g. 15 % of a book) in the national implementations will lead to unfair situations. Moreover, if the Member States decide to make use of this option, and each defines different percentages, there is a big risk that we will end up with different rules in different member states creating the same fragmented landscape that currently prevents online and cross-border education in the EU.

## **No compensation**

An exception is not a free pass to use copyrighted content in ways that cause unjustified harm to the copyright owners. In General uses made under an education exception cause minimal to no harm, and as a result the justification for compensation is relatively weak. This is

reflected by the fact that currently, 18 EU Member States have education exceptions that are completely or largely unremunerated. **It is essential that these Member State continue to allow the new uses for free.** For countries where the existing educational exceptions are subject to compensation, and where there is insufficient political will to make the new exceptions uncompensated it will be important that the administrative burden of such compensation schemes is minimized. This means that they should be negotiated on a flat rate and not on a per use basis and they should be collectively administered. **In all scenarios it is of paramount importance that copyright owners can continue to issue free licenses (such as the Creative Commons licenses) which are an important element of the growing use of Open Educational Resources in educational settings by educational institutions throughout the EU.**

### **Implementation outlook**

The presence of these three optional elements in Article 5 makes it very likely that Article 5 will be subject to intense discussions and lobbying during the implementation in the Member States. Article 5 provides Member States with the most room for manoeuvre of all the provisions introduced by the DSM Directive. This is partially due to the fact that practices related to the use of copyrighted content in educational settings substantially vary across the Member States. In the best case the optional elements in Article 5 will be used to tailor the new exception to work with existing national practices. In the worst case these optional elements will be used to weaken the position of educational institutions to the benefit of rightholders. Given the fundamental importance of education for our societies, it will be important to make sure that this does happen. The best way to achieve this goal will be to empower educational stakeholders to make their voice heard in national implementation processes, for national political actors to pay close attention to this element in national implementation processes and for the European Parliament to closely monitor the implementation of the education exception in all Member States<sup>10</sup>.

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<sup>10</sup> At the time of writing of this report the only Member State with a published proposal for an implementation law were the Netherlands. The [proposed law](#) does not make use of the three problematic options discussed above and proposes to implement the new exception as an expansion of the scope of the existing exception. In doing so the Netherlands provide a template that other MS should follow as much as possible.

## Article 6 preservation

Current EU law gives Member States the option to introduce an exception allowing for ‘specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage’.

In line with this, many countries do clearly include preservation copying among their exceptions to copyright (see a full list at [copyrightexceptions.eu](http://copyrightexceptions.eu)), either explicitly in the form of a preservation exception, or as part of a broader exception for libraries and other cultural heritage institutions, similar to the text of EU law. However, it is still common for there to be implicit or explicit limits on the way in which copies are made, the formats of the original or new version, and on the number of copies made. These all serve to restrict the possibility to use digitisation – i.e. the creation of digital copies and their appropriate storage – to achieve the mission of cultural heritage institutions.

A further complication linked to digitisation is the fact that the equipment necessary for this is often expensive, and given levels of use, it does not necessarily make sense for each cultural heritage institution to have its own. In response, it is common to form partnerships or networks – including across borders – which allow for a more effective use of public money, as well as a better outcome (i.e. more works preserved for the future). Similarly, once a copy is made, it may also make sense to store copies in servers across a number of countries in order to minimise the risk of permanent loss.

However, any cross-border applications of exceptions and limitations have, in the past, been hampered by inconsistency between laws, and uncertainty as to their legality in general. The new mandatory preservation exception introduced by the DSM Directive addresses this issue.

[Article 6 of the Directive](#) requires Member States to introduce an exception to copyright and related rights in their national laws in order to allow cultural heritage institutions (CHIs) to make reproductions of works that they have in their collections for preservation purposes.

This not only represents a step forwards in terms of the strength of the exception (rather than Member States being given the option of introducing an exception, this is now mandatory), but also ensures that libraries, archives and museums should not face any unnecessary restrictions on how they carry out this copying. Moreover, it makes it clear that it is legal to work across borders in order to carry out preservation, for example through networks or the sharing of equipment.

In the implementation process, it will nonetheless be necessary to ensure that cultural heritage institutions face minimal restrictions on the type of works that can be copied or by technical protection measures applied to the works that need to be preserved.

During the legislative proceedings that led to the Directive, cultural heritage institutions had argued that the scope of the exception should be expanded to allow cultural heritage institutions to make reproductions for any internal uses related to their public mission. While the final text of the Directive does not reflect this desire Member States should keep in mind that there are many legitimate reasons other than preservation (such as for administration, cataloguing, bibliography or for insurance purposes) for CHIs to make reproductions. Member States should therefore explore possibilities to go beyond the narrow focus on preservation (see the section on Article 25 below).

In general the new exception represents a step forward for cultural heritage institution. There are however some related issues that can impact the usefulness of the exception:

### **Rapid TPM removal**

The Preservation exception is covered by Article 7, which rules both that the terms of contracts, and technological protection measures should not prevent copying for preservation purposes. [Article 7](#) specifies that Member States must not give legal protection to Technological Protection Measures (TPMs) that would prevent cultural heritage institutions from exercising their rights to make reproductions under this exception. TPMs are a reality that cultural heritage institutions increasingly have to deal with and which they will encounter when making preservation copies under the exception. Unfortunately the Directive provides little clarity about the process to be followed in order to remove these.

The Directive underlines that rightholders should, first of all, be given the possibility to remove technological protection measures that prevent enjoyment of the exception. This could be problematic if it leads to long delays for cultural heritage institutions looking to carry out preservation work, with a need to apply for voluntary changes each time a TPM is encountered. **It will be important to ensure that such a process is quick and simple in order to ensure that cultural heritage institutions do not face unreasonable delays. To achieve this goal, Member States should stipulate that TPMs have to be removed by the rightholders within 72 hours after a request (See also the separate section on Article 7 below).**

### **Expansive list of works in permanent collection**

One of the most important conditions of the exception is that it applies only to “works or other subject matter permanently in the collections of a cultural heritage institution”. Recital 29 clarifies that this should be understood to include situations when works or other subject matter is ‘owned or permanently held’, for example because the cultural heritage institution owns the work outright, has signed a licence agreement, has permanent custody, or holds the work under legal deposit rules. **Cultural heritage institutions have identified two areas where there is some uncertainty: (1) Works that are licensed but stored on third party servers to which the institution gets access under the terms of the license. And (2) works that are held on the basis of long term loan agreements. In both cases Member States should clarify that such works are included in the scope of the Directive,**

### **Open list of purposes**

The new exception permits copying, regardless of the format or the medium of reproduction, and with the appropriate tool, means or technology, with the only rule being that any reproduction should only take place to the extent necessary for the purpose of preservation. The Recitals note digitisation as a particular example of this of preservation. During the legislative process cultural heritage institutions had argued that the exception should be expanded to cover any internal uses related to the institutions public interest mission. In this light, Member States should adopt an expansive definition of preservation to include other relevant activities such as cataloguing and bibliography. This could be based on the rationale that any type of reproduction associated with the survival of work should be permitted.

Article 25 of the new DSM Directive further allows Member States to adopt or maintain in force broader provisions which are compatible with the exceptions which are covered in the Database and InfoSoc Directives. The room provided by this provision should be used by Member States to enable other reproductions for internal and to enable web harvesting by cultural heritage institutions (see the section on Article 25 for more detail)

### **Implementation outlook**

The new exception established by Article 6 of the Directive has been one of the least controversial elements of the proposed Directive. The language of the Article is straightforward and provides clear benefits to cultural heritage institutions and the uses authorised by the exception do not have the potential to cause any significant harm to



rightholders. It is therefore unlikely that the implementation of this Article will result in substantial discussions. By taking into account the issues identified above national lawmakers can maximise the benefits to cultural heritage institutions and their users.

### **Article 7: Common provisions**

[Article 7 of the Directive](#) regulates two important issues for users: one related with the overlap between copyright exceptions and contracts, and the other related with the overlap between copyright exceptions and technical protection measures (“TPM”).

According to Article 7(1), some of the new mandatory exceptions and limitations to copyright cannot be overridden by contract. In other words, even if a user signs a private contract whose terms attempt to limit the rights of said user to use copyrighted materials under certain copyright exceptions, such contract terms are not enforceable against the user. It does not matter what country the contract is from, or whatever country’s law the contract is in, users based in the EU can continue to enjoy the right to benefit from the exception and simply ignore any provisions in the contract which conflict with the exception.

According to Article 7(2) second sentence, Member States have to ensure that users can access and use TPM-protected content according to some of the new mandatory exceptions. Crucially, this also applies to content acquired under contract and made available across the internet (something that was not the case under previous legislation).

It is important to note that the DSM Directive does not change the existing EU laws on TPMs, meaning that the users only have the right to require the rightholder to provide the technical means necessary to benefit from the exceptions but not the right to remove the TPMs themselves. This means that in practice TPMs can still significantly inhibit the use of these exceptions, which is highly problematic.

### **Rapid TPM removal**

To mitigate this problem, Member States should put in place a transparent rapid-response administrative procedure to ensure that beneficiaries of the exceptions covered by Article 7 receive the technical means to access and use TPM-protected content without undue delay (within 72 hours). **To provide an incentive for rightholders to comply with such a requirement, Member States should consider allowing beneficiaries of the exceptions to circumvent TPMs to the extent needed to use the TPM protected content if the use has**

**not been enabled 72 hours after the request. Alternatively Member States could consider to make copyright owners liable towards users if uses covered by these exceptions is not enabled within 72 hours from being requested.**

### **Implementation outlook**

The provision prohibiting contract override for the new exceptions and limitations is as clear-cut as it is welcome and it leaves no discretion to Member States. The provisions dealing with TPMs are of a much more technical nature and will likely cause much more discussion during the national implementations of the Directive. While the intention of the European legislator (to shield the beneficiaries of the new exceptions from the adverse effects of TPMs) is very welcome, much will depend on the willingness of national legislators to create sufficient incentives for rightholders to remove TPMs at the request of the beneficiaries of exception.

While seemingly of a technical nature the ability to exercise the rights granted under these exceptions without interference from TPMs is extremely important for research, education and cultural heritage institutions. Given the increased digitization of collections the prevalence of TPMs must be expected to increase. Forward looking national legislators must therefore ensure that the provisions on TPM in Article 7 of the Directive are implemented in a way gives the beneficiaries of the new exceptions real leverage.

### **Articles 8-11: Use of out-of-commerce works**

In an attempt to address the problem of the [20th century blackhole](#), European legislators are creating a framework that should allow CHIs to overcome the legal challenges around the digitisation and dissemination of their collections. Following the [Orphan Works Directive](#) from 2012, the DSM Directive's provisions on Out Of Commerce Works (OOCWs) focus on a wider category of works: works that are not available to the public through customary channels of commerce (orphan or not).

In order to allow CHIs to make OOCWs in their collection available online the Directive introduces a two tiered approach, that relies on licensing as a primary mechanism and a mandatory exception as a secondary ("fall-back") mechanism. This novel approach is the result of successful lobbying by cultural heritage institutions which resulted in the addition of the fall-back exception to the more limited original proposal that only relied on a licensing mechanism.

The licensing mechanism, based on so-called extended collective licensing (ECL)<sup>11</sup> or a presumption of representation, is a solution that is already in place in some European Member States, especially in the Nordic countries, often used in the educational sector. It allows CMOs to give licenses not only on behalf of authors that have granted them permission to do so, but also of authors that haven't. The "extension" of the license to cover works of authors that are not part of the CMO is possible because of the (presumed) representativity of the collective management organization.

In sectors or for types of works where there are no sufficiently representative CMOs (sufficiently representative for the type of work and for one or more rights) cultural heritage institutions can rely on an exception in order to make OOCWs in their collections available online.

The provisions dealing with the use of Out of Commerce Works by cultural heritage institutions are implemented in Articles 8, 9, 10 and 11 of the Directive:

[Article 8](#) requires that member states provide a legal solution to allow CHIs to digitise OOCWs and to make them available online. The two possible solutions are a licensing mechanism or, when there is no representative collective management organisation (CMO) that can issue such licenses for certain uses and types of work, an exception to copyright.

Out of Commerce Works are works that have never been in commerce or when the work as a whole is no longer available through "customary channels of commerce". There is no limitation with regards to the type of work or other subject-matter. The provisions also apply to works that have never been in commerce and unpublished works<sup>12</sup>. Member States are allowed to provide specific requirements to determine whether a work is OOC, such as a date before which everything is considered out-of-commerce (a cut-off date).

Rights holders whose works are digitised and made available under these provisions will be able to opt out, meaning to request the "removal" of their works from what has been made available through the license or the exception.

[Article 9](#) provides that the mechanisms introduced in Article 8 allow access from all EU Member States. A European portal will be created by the European Intellectual Property

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<sup>11</sup> The Directive refers both to ECL and to a presumption of representation. The abbreviation ECL is used to cover both.

<sup>12</sup> Think of works such as letters, posters, leaflets, trench journals or amateur audiovisual works as well as unpublished literary works.

Office ([EUIPO](#)), the institution also in charge of the [Orphan Works Database](#), to identify and provide information on out-of-commerce works ([Article 10](#)).

Member states need to organise a dialogue ([Article 11](#)) among rights holders, CMOs and CHIs to agree on requirements of what is considered an OOCW, and at the practical level to make licenses and the exception workable. It will be key for cultural heritage institutions to take part in these discussions.

Taken together, these provisions are very promising for the mass digitisation of OOCWs and have the potential to resolve one of the biggest problems that cultural heritage institutions have faced when shifting their activities online. **However the provisions are also very complex and rely on effective collaboration between a complex set of stakeholders (cultural heritage institutions, collective management organisations, rightholders and the EUIPO). Given this national legislators should implement these provisions in ways that facilitate en incentivise such collaborations.**

### **Workable definition of representative CMO**

From the perspective of cultural heritage institutions there is a big difference between making OOCWs available based on the exception or under an extended license issued by a CMO. Having to obtain licenses will require good negotiating skills, these negotiations can be inconclusive, the cross-border applicability is less straightforward and licenses will be subject to remuneration.

It is therefore important that Member States establish clear criteria for when a CMO can be considered CMO to be “sufficiently representative of rightholders” for a type of work.

**Ideally this will result in a list of CMOs that are considered to be representative for specific types of works in the Member State. Based on such a list cultural heritage institutions can determine for which types of works they will need to conclude license and which types of works can be made available under the exception.** Determinations of representativeness should be made by the Member State authorities in close collaboration with both CHIs and CMOs. In this context, Member States should attempt to facilitate a dialogue between CHIs and CMOs aimed at creating consensus on the types of works for which the collective licensing mechanism makes sense (Such a dialogue should be part of the stakeholder dialogues that need to be conducted pursuant to Article 11).

## **Workable and broad definition of OOCW**

The definition of OOCWs contained in [Article 8\(5\)](#) is very general and is not always straightforward to apply to all kinds of works. It is obvious that cultural heritage institutions would benefit from the broad definition coupled with easy to comply with requirements for determining that a collection of work is indeed out of commerce<sup>13</sup>. This

Under the second part of Article 8(5), "Member States may provide for specific requirements, such as a cut-off date, to determine" the out of commerce status of works. Declaring all works that have been published/created before a certain date to be out of commerce<sup>14</sup> would significantly reduce the effort cultural heritage institutions have to undertake to identify collections of out of commerce works. **In the interest of facilitating the online availability of Out of Commerce Works, Member States, in dialogue with cultural heritage institutions, collective management organisations and other rights holders should attempt to work with cut-of-dates for as many types of works as possible.**

## **Inclusive stakeholder dialogue**

Article 11 requires Member States to organize stakeholder dialogues involving " rightholders, collective management organisations and cultural heritage institutions in each sector" to establishing specific requirements for determining the out of commerce status of collections in pursuant with Article 8(5). As outlined in the two previous sections such stakeholder roles can play an important role in ensuring that they OOCWs provisions of the Directive work in practice.

It is therefore of utmost importance that Member States organize inclusive stakeholder dialogues that include equal representation from all types of stakeholders and that are conducted with the objective of creating workable national rules for making OOCWs available. **While Member States will have some influence over the setting and direction of the stakeholder dialogues, this will require the willingness of all stakeholders to collaborate on solving the issue. This will require an amount of mental flexibility by all stakeholders who have traditionally perceived each other as opponents (CHIs on one**

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<sup>13</sup> It is important that the clarifications contained in recital 38 (no work by work search requirement, searches do not need to be undertaken repeatedly over time) are transposed into national legislation.

<sup>14</sup> Obviously this will only work in combination with the ability of rightholders to opt-out from such determination that is provided for in [Article 8\(3\)](#).

**side vs CMOs and other rightholders on the other).** In the end the ability of these stakeholders to collaborate will be essential in achieving the goals of the DSM Directive

### **Workable EUIPO database**

Article 10 requires that information on out-of-commerce works must be published "on a public single online portal" that is to be "established and managed by the EUIPO" six months before the works themselves can be made available online by the cultural heritage institutions. This six month pre-publication period is intended to ensure that rightholders who object to making available of their works have the ability to opt-out in line with Article 8(4) before their works are made available online.

The functioning of the EUIPO portal will play an important role in how effective the provisions of the new Directive will be in enabling access to OOCW held in the collections of Europe's cultural heritage institutions. The portal will need to provide CHIs and CMOs with low friction workflows to publish the required identifying information and will need to automatically update them about opt-outs and other changes in the status of works for which they have provided information. The portal will also need to provide rightholders with a reliable, effective and trusted way to make use of their ability to opt-out in line with Article 8(4).

In short, the portal has the potential to make or break the effectiveness of the provisions aimed at improving access to OOCW. In order to contribute to the objective of the Directive, the portal will need to integrate well with existing workflows of the intended users (CHIs, CMOs and other rightholders), be able to process large quantities of incoming data, and become a trusted and persistent source of information on the use of OOCW and opt outs registered by rightholders.

**Given the crucial role the portal plays in the overall system aimed at enabling access to out of commerce works, the European legislator must ensure that the EUIPO develops the portal in close collaboration with all affected stakeholders and that it allocates sufficient resources to both building the portal and supporting CHIs and CMOs in publishing the required information via the portal<sup>15</sup>. The EUIPO should consider the responsibility to run this portal not only as a legal responsibility but also as an**

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<sup>15</sup> In this context it is worth noting that in March 2019 [the European Court of Auditors concluded](#) that "the budget surplus of the EU Intellectual Property Office (EUIPO), amounting to almost half a billion euros in 2018, should be put to a productive use".

**opportunity to provide a valuable service to the cultural heritage sector and collective management bodies that enhances the quality and interoperability of rights information available across the sector.**

### **Implementation outlook**

The provisions on out of commerce works are among the most complex provisions in the DSM Directive. To successfully implement them Member States will be dependent on the willingness of all stakeholders to constructively collaborate. The national stakeholder dialogues will play a crucial role in this and Member States should invest in creating the conditions for collaboration between cultural heritage institutions on the one side and collective management organisations and other right holders on the other side.

**The pre-conditions for this to happen vary substantially across the Member States. The scope of collective management varies substantially between Member States and while some member states have existing collaborations between cultural heritage institutions and collective management organisations these are lacking in others. As a result the European legislator should carefully monitor Member State implementations of the OOCW provisions and facilitate information exchange between the Member States.**

In addition the European legislator must also ensure that the EUIPO portal will become an instrument that actively facilitates cultural heritage institutions and collective management organisations in making available out of commerce works contained in their collections.

### **Relationship with the Orphan Works Directive**

The introduction of these new rules for making available Out of Commerce works is also raising questions about the future of [Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works](#). Conceptually the two Directives are overlapping each other: All Orphan Works are by definition also Out of Commerce works. **Given that the Orphan works Directive is widely considered to be a failure, that to date only a very small number of works has been identified as Orphan**

**Works<sup>16</sup> and that the OOCWs provisions of the DSM Directive are much easier to comply with, the EU legislator should consider revoking the Orphan Works Directive<sup>17</sup>.**

#### **Article 25: Further harmonisation of existing exceptions and limitations**

Article 25 (“Relationship with exceptions and limitations provided for in other Directives”) which was added to the text of the Directive by the European Parliament<sup>18</sup> is one of the most important improvements of the final text over the original Commission proposal. It

States that “Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in the [InfoSoc and Database] Directives, for uses or fields covered by the exceptions or limitations provided for in this Directive”. In other words it makes it clear that the provisions of the DSM Directive do prevent the Member States from implementing additional exceptions, as long as they meet the requirements in existing EU law. This means that Member States implementing the DSM Directive will be free to make full use of the legislative room provided by the 19 optional exceptions contained in the InfoSoc Directive, many of which have not been implemented in many Member States.

In the interest of harmonization of user rights across the EU Member States should make sure to implement at least a minimum set of these exceptions in addition to the new exceptions mandatory exceptions introduced in the DSM Directive. In addition to newly mandatory quotation and parody exceptions (see the section on Article 17 below) Member States should make sure that they have fully implemented the following five exceptions from the InfoSoc Directive:

#### **Art. 5.2(c) Reproductions by cultural heritage institutions**

As discussed above, the new exception introduced Article 6 of the DSM Directive allowing reproductions for the purpose of preservation does not cover all needs of cultural heritage institutions. The main uses not covered by the new exception are internal uses by cultural heritage institutions and web harvesting (making and storing copies of publicly available

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<sup>16</sup> At the time of writing the [EUIPO's Orphan Works database](#) contained 5,923 main works and 6,947 embedded or incorporated works.

<sup>17</sup> A decision to revoke the Directive could be based on the outcome of the Commission's evaluation of the Directive which, in line with Article 10 of the Directive, was due on 29 October 2015. This review has not been undertaken yet and should therefore include the question in how far the Directive is still relevant in the light of the OOCW provisions introduced by the DSM Directive.

<sup>18</sup> It can be traced back to a JURI amendment (AM 993) tabled by MEP Kosma Zlotowski (ECR).



websites for the purpose of preservation). Both of these uses can be covered by targeted national implementations of Article 5.2 (c) of the InfoSoc Directive that allows “specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage”. **Member States should work with cultural heritage institutions to understand their specific needs and how these can be addressed alongside the implementation of the DSM Directive.**

#### **Art 5.3(a) Illustration for teaching or scientific research**

The education exception introduced by Article 5 of the DSM Directive only applies to digital and cross border educational uses. [Most member states already have education exception based on Art 5.3\(a\) of the InfoSoc Directive](#) but the scope of these exceptions is often limited. **Member States implementing the DSM Directive should review the scope of their education exception and make sure that they cover all types of educational uses by educators and learners in both formal and informal education settings.**

#### **Art. 5.3(i) Use of works of architecture or sculptures in public spaces**

One of the areas where the lack of harmonisation of exceptions between Member states is most egregious is the so called “freedom of panorama”. Freedom of Panorama results from national implementations of an exception based on Art. 5.3(i) of the Infosoc Directive which allows the use of “works of architecture or sculpture, made to be located permanently in public places”. In member states where this exception is not implemented, sharing a photo of a public setting that depicts a copyright protected work of architecture or a sculpture infringes the rights of the author of such works. [The exception is not implemented in a number of member states and some that have implemented it only allow non-commercial uses](#). This creates an unwelcome situation in which every day acts that are legal in one member state are infringing in another. **Member States that so far have not implemented the exception should remedy this situation by fully implementing the “freedom of panorama” exception alongside with the implementation of the DSM Directive.**

### **Art. 5.3(k) Incidental inclusion**

Article 17(7) of the DSM Directive requires Member States to ensure that users of Online Content Sharing Service Providers can rely on the exceptions for “quotation, criticism, review” (Article 5.3 (d) InfoSoc Directive) and “use for the purpose of caricature, parody or pastiche” (Article 5.3 (k)). While these two exceptions cover the majority of transformative types of user-generated content uploaded by users to online platforms, such as remixes and mash-ups they do not cover all possible uses. **To fully achieve this objective, Member States that have not implemented the the exception allowing the incidental inclusion of protected works in their national laws should implement this exception together the implementation of the provisions introduced by the DSM Directive.**

### **Art. 5.3(n) Use for the purpose of research or private study**

Under national implementations of Art 5.3(n) of the InfoSoc Directive cultural heritage institutions in a number of Member States can make works in their collections available to their patrons for research or private study. This needs to happen via dedicated terminals located on the premises of the institutions<sup>19</sup>. **This exception is essential in allowing cultural heritage institutions to provide the public access to works in their collections that cannot be made available online because of copyright restrictions and from the perspective of cultural heritage institutions it is unacceptable that this exception is not implemented in all Member States. Those Member States that have not (fully) implemented the exception should implement it together with the implementation of the provisions introduced by the DSM Directive.**

### **Exceptions and Limitations: Summary**

The provisions included in the first half of the DSM Directive significantly improve the position of the research, education and cultural heritage sectors. The new mandatory exceptions are generally straightforward and address real needs identified by these sectors.

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<sup>19</sup> While this exception allows cultural heritage institution to provide a valuable service in line with their public interest missions, it is worth noting that the limitation requiring the use of “dedicated terminals” is out of sync with reality as it limits institutions from allowing visitors to bring their own devices (such as smartphones, tablets or laptops) to access works from the collections. During the legislative proceedings related to the DSM Directive, cultural heritage institutions have unsuccessfully tried to get this anachronistic requirement removed from the exception. However, this does not mean that the existing exception does not provide value to (the patrons) of cultural heritage institutions.

During the legislative proceedings the research and cultural heritage sectors have managed to further strengthen these provisions. The most important concerns related to the new exception are the ability of Member States to (partially) override the new education exception and a number of issues related to the complexity of the OOCWs provisions. In both cases the European Legislator should closely monitor the implementation. In the case of the Out of Commerce provisions the EU legislator can play a more active role by facilitating information exchange between Member States and by ensuring that the EUIPO portal can actively support cultural heritage institutions in making Out of Commerce Works in their collections available online.

In order to implement the DSM Directive all Member States will need to update their copyright acts. This provides an opportunity for them to implement some of the optional exceptions identified in the InfoSoc Directive. In the light of the overall objective of the Directive to further the goal of a Digital Single Market, all Member States should make sure that they have implemented the five key, public interest derived exceptions discussed above. Together with the now mandatory quotation and parody exceptions and the five new exceptions introduced by the DSM Directive this would ensure a minimum level of harmonisation of user rights across the EU.

## **Part 2: Other provisions**

In addition to the new exceptions discussed in the previous part, the DSM Directive includes a range of other provisions. These include an optional general ECL provision (Article 12), a provision dealing with access to audiovisual works on Video on Demand platforms, a provision introducing a new neighbouring right for press publishers (Article 15), a provision entitling publishers to a share of the compensation for uses of a work under a compensated exception (Article 16), and a number of provisions improving the contractual position of authors and performers (Articles 18 - 23). All of these provisions fall outside of the scope of this analysis.

This section will (briefly) discuss the two remaining provisions of the DSM Directive. Article 14 on works of visual art in the public domain and Article 17 on use of protected content by online content-sharing service providers. These provisions are of interest since they either directly concern the practices of cultural heritage institutions (Article 14) or because they have an effect on the system of exceptions and limitations to copyright discussed in the previous section.

### **Article 14: Works of visual art in the public domain**

[Article 14 of the Directive](#) is one of the very few unambiguously good provisions of the new EU Copyright Directive. The Article is intended to ensure that reproductions of public domain works of visual art cannot be protected by exclusive rights, and as a result be taken out of the public domain. It is the first time that an EU law tries to protect the public domain.

This legislative intervention comes in response to the relatively widespread practice of museums in claiming exclusive rights of digital reproductions of public domain works that they have in their collections and which they make available to the public. In practice this has already led to [Spanish Museums claiming copyright over paintings by Dutch masters who have been dead for 350 years](#), and [German museums suing Wikipedia for hosting reproductions of public domain works as part of Wikimedia Commons](#).

While at first glance it seems counterintuitive that a museum should be able to control the rights for artworks of long dead artists, such claims do have a basis in existing law. In general, for a work to be protected under copyright it needs to show “the author’s own intellectual creation.” However, there is another category of copyright-like rights (also called “related rights”) that exist in a number of EU Member States. These schemes grant exclusive rights to the creators of photographic works that do not meet the originality criterion necessary to

receive copyright protection<sup>20</sup>. Related rights arise even when a reproduction is nothing more than an exact photographic copy of a work. Where copyright protects original artworks, these related rights protect simple copies.

As museums have started to make works in their collections available online, the practice of relying on related rights to restrict the re-use of non-original reproductions of public domain works has become controversial. Both the [Public Domain Manifesto](#) and the [Europeana Public Domain Charter](#) demanded that what is in the public domain in analogue form must stay in the public domain in digital form. While the overall majority of museums have always acted in the spirit of expanding the public domain, and have made reproductions of public domain works available without any restrictions on re-use, a small number of museums from [Member States that allow the protection of non-original reproductions of public domain works](#) continue to claim rights over such reproductions.

From the perspective of users trying to identify the copyright status of these reproductions of public domain works, this fragmented legal landscape was difficult to grasp. If works by the same creator could be protected by copyright-like rights in one Member State but could be in the public domain in another, there was no legal certainty when using the reproductions online and across borders. Harmonizing the copyright status of these reproductions in every EU country was, thus, necessary to safeguard the users right to enjoy the works of visual arts that have fallen into the public domain.

In the majority of Member States national legislators will not see the need to take action on this Article, as national laws and jurisprudence do not foresee any protection on faithful reproductions of works in the public domain. Member States which do recognize the protections of non-original reproductions<sup>21</sup> will need to implement Article 14 into their national copyright acts. At the minimum this means excluding faithful reproductions<sup>22</sup> of visual artworks in the public domain from any existing neighbouring rights protections.

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<sup>20</sup> See this [2015 study by Thomas Margoni](#) for more details

<sup>21</sup> According to the study undertaken by Thomas Margoni this concerns Austria, Denmark, Finland, Germany, Italy, Spain and Sweden.

<sup>22</sup> While most of the discussion has centered on photographic reproductions of 2 dimensional works such as paintings it is important to note that the Article applies to all non-original reproductions of works of visual arts in the public domain, including 3D models/scans of sculptures.

## Article 14 as a general rule

Article 14 in its current form is the outcome of a late stage legislative compromise between the European Parliament and the Council<sup>23</sup>. And while it is an important step forward in protecting the public domain from appropriation, the limitation on “works of visual art” does not make any sense. **The rationale that a non-original reproduction of a public domain work should not be protected by exclusive rights applies just as well to all other types of work. Member States implementing Article 14 into their national laws should therefore implement it in such a way that non-original reproductions of all types of public domain works are not subject to copyright or related rights.**

## Article 17: Use of protected content by online content-sharing service providers

Article 17 is supposed to address a so-called "value gap" identified by the music industry. According to this industry, online platforms such as YouTube and Facebook make huge profits by selling advertisements alongside copyrighted content uploaded by their users—all without adequately rewarding the copyright owners. While this general observation is most likely correct, the measures proposed to remedy the value gap has proven to be politically decisive and there are serious doubts that they will indeed result in a more equal distribution of the value generated by these platforms.

The core of Article 17 is a provision making platforms that host content uploaded by their users liable for copyright infringements committed by their users. Before the DSM Directive, online platforms that host content uploaded by users could rely on Article 14 of the [E-Commerce Directive](#) to provide their services. Under this provision, platforms can host uploaded content without any risk, as long as they remove such content once they receive information that it is infringing on someone else’s rights. This limitation of liability for copyright infringement committed by users provided the legal foundation for the development of a wide range of online platforms that allow user uploads. A large number of platforms rely on this safe harbour<sup>24</sup> while at the same time many platforms also entered into licensing agreements with copyright owners to ensure continued availability of copyrighted content on their platforms and to show advertisements alongside that content.

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<sup>23</sup> It can be traced back to efforts by civil society organisations advocating for open access to knowledge and culture to introduce a general public domain protection clause in the DSM Directive.

<sup>24</sup> It is worth noting that to date the CJEU never clarified if the big platforms targeted by Article 17 such as YouTube are indeed be eligible for this protection.

[Article 17 of the Directive](#) (formerly Article 13) of the Directive, on the one hand, excludes certain for-profit content-sharing platforms from the above-mentioned liability protections, and, on the other hand, makes them liable for infringing content uploaded by their users. As a result, they have two options: (a) they obtain authorizations from copyright owners to communicate such content or, if no authorization is granted, (b) they take a set of steps to be exempted from liability for such infringing content, such as actively searching for infringing content by filtering or other mechanism.

The first option is the preferable option, from the users rights perspective, but it will only be effective if Member States do not rely on individual licensing to grant authorizations to platforms for every piece of content that is available on their services. The second option may require the use of automated filtering technology and, thus, result in widespread over-blocking of users' uploads, interfering with uses made under copyright exceptions and with fundamental freedoms, such as freedom of expression<sup>25</sup>.

**Taking into account that users rights will be at greater risk if the platforms rely on filters than if they obtain authorization to communicate their users' uploads, national lawmakers should fully explore legal mechanisms for granting those authorizations and limit, to the extent possible, the application of filtering technologies.** Turning the exclusive right granted by Article 17 into a remuneration right or into a copyright exception or limitation subject to remuneration would be the ideal solutions.

In the current situation it seems relatively unlikely that Member States can implement Article 17 in such a way that the application of filtering technologies can be prevented<sup>26</sup>. This raises important questions about the balance between the obligations that Article 17 imposes on platforms and the rights of users of these platforms. In this regard the text of the Article contains a number of conflicting provisions that may be difficult to reconcile by Member States seeking to implement the directive. **For this analysis it is important to note that in spite of its public reputation as a draconian measure limiting user freedoms, the second half of Article 17 actually contains a number of provisions that significantly strengthen the rights of users sharing content via online platforms<sup>27</sup>.** There are two groups of provisions that are especially interesting in this regard. Provisions dealing with the

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<sup>25</sup> Because of this, the Polish government [filed an action for annulment of Article 17 with the CJEU](#), which means the court still has a saying about the faith of this controversial provision. In the meantime, EU countries have to implement it.

<sup>26</sup> This is contrary to the expectation expressed in the statement of the German government at the occasion of the adoption of the Directive by the Council.

<sup>27</sup> Most of these have been added to the text by the European Parliament during late stage trilogue negotiations and are the result of significant pressure from internet users and civil society groups.

relationship between exceptions and limitations and the filtering obligations introduced by Article 17 (these can be found in paragraphs 7 and 9) and provisions establishing procedural safeguards for these user right (in paragraph 9). Both sections have been carefully analysed by a group of European copyright academics who in November 2019 have issued [Recommendations for safeguarding User Freedoms in Implementing Article 17](#) that have been signed by more than 50 academics from the relevant fields.

### **Exceptions and limitation in the context of Article 17**

As mentioned above, [Article 17\(7\)](#) requires Member States to ensure that users of Online Content Sharing Service Providers (OCSSPs) can rely on the existing exceptions for “quotation, criticism, review” and “use for the purpose of caricature, parody or pastiche”. While there has been some doubt with regards to how to interpret “existing” in this context, the above mentioned academic statement shows that “existing” must be read to “refer[s] to those E&Ls already contained in EU law”. **This means that at least with regards to making available works via OCSSPs<sup>28</sup>, Member States who have not done so must implement the parody exception (Art 5.3(k) from the InfoSoc Directive)<sup>29</sup>.** In order to fully safeguard users freedom of creative expression on online platforms falling within the scope of Article 17, the academic statement also recommends that “Member States should consider clarifying in their national laws that the E&L for incidental use applies fully in the context of acts of making available by users on OCSSP platforms”. This recommendation is in line with the recommendation made in the section on Article 25 above.

[Article 17\(9\)](#) of the Directive further provides that the filtering requirements established by Article 17 “shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”. **The wording of this provision (“in no way”) makes it clear that the protection of the user rights derived from these exceptions and limitations must be given priority over the requirement imposed on online platforms to filter works uploaded by their users.**

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<sup>28</sup> The [Academic Statement on safeguarding User Freedoms in Implementing Article 17](#) recommends that Member States implement these exceptions for all types of uses: “A rational national lawmaker implementing the E&Ls in Article 17(7) in line with the above recommendations should take this opportunity to fully harmonize the respective national E&Ls beyond uses concerning OCSSPs.

<sup>29</sup> They also have to implement the quotation exception but this exception is one of the very few that is already implemented by all EU Member States.



## Procedural safeguards for user rights

In order to protect user rights Article 17(9) establishes a number of procedural safeguards: OCSSPs must implement “effective and expeditious” complaint and redress mechanisms for users in the event of disputes. These mechanisms entail obligations for both rightholders and OCSSPs. On the one hand, rightholders that request the disabling or removal of content must “duly justify” their requests. On the other hand, OCSSPs that administer complaint and redress mechanisms must process submitted complaints “without undue delay” and subject decisions to disable or remove content to human review. These safeguards significantly strengthen the positions with regards to filtering/blocking by platforms as the existing legal framework does not impose any such requirements on platform operators and rightholders. Existing filtering systems like YouTube’s Content ID work based on rules that have been determined by the platforms themselves.

**In order to meet the requirement not to “affect legitimate uses, such as use under exceptions or limitations” Member States must implement these safeguards in such a way that, for OCSSPs, the requirement to protect users’ rights prevails over the requirement to remove or block access to content uploaded by their users. Since current technology is not capable of assessing the legality of individual uses of copyrighted works, this means that platforms must be prevented from automatically disabling access to or preventing the upload of works unless there is certainty that the use in question is infringing. In all other cases, users must have a meaningful opportunity to assert their rights, and uploads must remain available to the public until it has been established that a use is indeed infringing<sup>30</sup>.**

While such an implementation would be beneficial from the perspective of users, it represents a huge challenge from the perspective of the European legislator. Given the different policy positions of Member States during the legislative proceedings there is a high likelihood that the implementations of the user rights safeguards will differ substantially between the Member States. This would run counter to the overall objective to create a Digital Single Market. Establishing uniform rules for implementing the user rights safeguards must therefore be one of the priorities of the [stakeholder dialogue on the implementation of Article 17](#) that

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<sup>30</sup> This recommendation is echoed in the [Academic Statement on safeguarding User Freedoms in Implementing Article 17](#): “We recommend that where preventive measures [...] lead to the filtering and blocking of uploaded content before it is made available to the public, Member States should, to the extent possible, limit their application to cases of prima facie copyright infringement. In this context, a prima facie copyright infringement means the upload of protected material that is identical or equivalent to the “relevant and necessary information” previously provided by the rightholders to OCSSPs, including information previously considered infringing. [...] In the remaining cases (no prima facie infringement) there should be no presumption that the uploaded content is infringing, meaning that such content should remain available to the public in the OCSSP until its legal status is determined, following a procedure consistent with Article 17(9).”

are currently ongoing<sup>31</sup>. **The European Parliament, on whose initiative these user rights safeguards were introduced into the text of the Directive, must carefully monitor the proceedings of the stakeholder dialogues and demand that the Commission fully takes these important safeguards into account in the guidelines to be issued based on the outcome of the stakeholder dialogues.**

## **Public database**

During the ongoing stakeholder dialogue another important aspect that requires attention on the European level emerged. [Article 17\(4\)](#) gives rightholders unprecedented abilities to require OCSSPs to prevent the availability of works (block uploads) and to remove works from their services. Request for blocking or removal must be based on collaboration between rightholders and platforms as part of which rightholders must provide OCSSPs with “relevant and necessary information”. Apart from the issues related to user rights under exceptions and limitations discussed above, this raises another important concern. The information provided by rightholders may be erroneous, misleading or conflicting leading to unjustified actions by OCSSPs. In order to prevent unjustified removals or blocking by rightholders claiming ownership of works that they do not own, such requests for blocking or removal should be made by submitting the “relevant and necessary information” to a centralised publicly accessible database. This would allow public scrutiny of claims of ownership and reduce the risk of misappropriation of works. It would also provide a mechanism for resolving conflicting or contradictory rights claims, thereby improving the quality of the rights information.

While these effects are important in the context of protecting users from erroneous blocking and removal, such a public database would also serve another important function that serves both rightholders and (smaller<sup>32</sup>) OCSSPs: It would significantly reduce the cost associated with managing the “relevant and necessary information” as such information would only need to be provided once (rightholders) and would be consolidated in a single source (OCSSPs).

**In order to increase the quality of the rights information and to reduce the overhead costs for rightholders small OCSSPs the European legislator should require the use of a**

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<sup>31</sup> At the time of writing two meetings of the stakeholder dialogue had taken place. These meetings (and the two meetings planned for the remainder of 2019) have not yet addressed concrete implementation questions related to article 17 but have so far focussed on discussing “existing practices”. For a critical summaries of these meetings by COMMUNIA see [here](#) and [here](#).

<sup>32</sup> From the perspective of the bigger OCSSPs such as YouTube and Facebook having their own private databases with rights information is a competitive advantage. Requiring all platforms to work with a public database will diminish the competitive advantage that Article 17 affords to the existing dominant platforms.

**single public database for the storage of the “relevant and necessary information” shared between rightholders and OCSSPs in the context of the blocking and removal actions undertaken in line with Article 17(4).**

## Conclusions

The above analysis of key provisions of the DSM directive shows that overall the Directive represents a substantial improvement for institutions from the research, education and cultural heritage sectors operating in the digital environment. Most of the provisions leave relatively little space for diverging implementations by the Member States (a welcome change from the approach of the InfoSoc directive) but there are a number of mainly secondary issues that can significantly improve (or worsen) the position of public interest organisations.

Recommendations on how Member States can best deal with these issues are included throughout the text above in **bold**. In some cases (notably with regards to the TDM and OOCW provisions and in the context of implementing Article 17) there is also a continued need for the European legislator to intervene in order to avoid additional fragmentation of the copyright system.

In addition to these observations and recommendations related to individual Articles of the Directive two themes that are woven throughout the fabric of the Directive that should be on the radar of the European Legislator in the coming years. The first one is the continued need to fix the fragmentation of the user rights in the EU. The second one is the emerging issue of investing into registration infrastructures to improve the functioning of the EU copyright framework.

### Fixing the fragmentation of exceptions and limitations

As outlined though this document the DSM directive does not contain dedicated steps towards reducing the fragmentation of user rights in the European Union. The existing system of optional exceptions and limitations established by the InfoSoc directive remains in place. In a welcome deviation from this approach all the new exceptions in the DSM Directive are mandatory which prevents further fragmentation.

As outlined in the section on exceptions and limitations above (and specifically the section on Article 25) the fact that the Member States have to open up their copyright laws in order to implement the directive provides them with the opportunity to implement further (so far unimplemented) exceptions from the InfoSoc Directive and to strengthen or modify existing ones to better reflect the needs of beneficiary organisations. While this can theoretically lead to a harmonized set of 12 key exceptions<sup>33</sup> that would provide a minimum level of guaranteed

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<sup>33</sup> The 5 new exceptions from the DSM directive (TDM, online educational use, preservation and access to OOCWs) plus the 5 exceptions highlighted in the section on Article 25 (incidental inclusion, illustration for

user rights that can be enjoyed by citizens across the EU, this is a relatively unlikely outcome of the implementation process. On the Member States level EU wide harmonisation of user rights is generally not a political objective, in many Member States a “pure” implementation of the rules of the DSM directive will be more straightforward in terms of legislative procedure<sup>34</sup> and in many member states there is substantial political opposition to introducing additional exceptions.

Still from the perspective of the European legislator further harmonisation of exceptions and limitations must be a key policy objective. **A situation in which the rights of users vary depending on the Member State from which the access the Internet undermines the idea of a Digital Single Market and is contrary to the principle of equality before the law. This means that the European Parliament should closely monitor the implementation of exceptions and limitations in the Member States and should continue to call attention to the problem of fragmentation.**

One problem with this is that there is currently no official, comprehensive and up to date overview of the implementation landscape. The only unofficial source of such information, the above mentioned online resource [www.copyrightexceptions.eu](http://www.copyrightexceptions.eu), dates from 2016 and is not actively maintained at this point in time<sup>35</sup>. As part of an effort to highlight the ongoing issue of fragmentation of user rights in the EU the European Parliament could explore ways of supporting the continued operation of this platform. Alternatively the European Commission should be requested to publish up to date information on the implementation of exceptions and limitations by the member states on a public single online portal provided by the Commission.

### **Building a registration infrastructure**

The second theme that deserves forward looking attention from the EU legislator is the emergent trend of building registration infrastructures to improve the functioning of the EU copyright framework. Registration of work as a prerequisite for granting copyright protection is in violation of [Article 5\(2\) of the Berne Convention](#). This fact is frequently used to shut

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teaching and scientific research, access for research and private study, reproductions by CHIs and freedom of panorama) plus the two de facto mandatory exceptions from Article 17(7) (quotation and parody).

<sup>34</sup> The only EU member state that has so far published a complete implementation act, the Netherlands, is restricting itself implementing changes required by the DSM directive. According to the [explanatory memorandum](#) this is due to the fact that a pure implementation act can be adopted via a simplified legislative procedure.

<sup>35</sup> The website was built by the Dutch CSO Kennisland, which stopped working on copyright issues at the end of 2018. Since then the website is in maintenance mode.

down discussions about the benefits of registering copyrighted works. It is however undisputed that registration of basic copyright information (especially the claims of authorship/claims of owning the copyright in a work) would substantially improve the functioning of copyright in the digital environment where the marginal costs for registering such information and subsequently accessing are zero.

This fact is implicitly recognized by the DSM directive which flirts with forms of registration in three different provisions. This concerns the ability for rightholders to reserve the right to make reproductions for the purpose of Text and Data Mining in Article 4(3), the ability for rightholders to opt out from the Out of Commerce Works provisions in Article 8(4) and the need for rightholders to provide “relevant and necessary information” to OCSSPs in order to prevent use of their works by users of these OCSSPs.

While none of these provisions directly mandate the creation of a registration system, the “public single online portal” for OOCWs to be maintained by the EUIPO comes very close. As discussed in the section on Article 17, the mechanisms foreseen in Article 17(4) can best be implemented by storing the “relevant and necessary information” in a single publicly accessible database. In both instances article 5(2) of the Berne convention does not stand in the way of building a registration system as these registration systems would only make certain ways of exercising copyright conditional on the registration of registering claims to work in a public database.

In both instances a well functioning and well designed public database/portal will be an essential element of a successful implementation of the respective provisions of the DSM directive. Given that such databases only make sense if they operate on the European level, the European Union<sup>36</sup> will need to play a key role in designing, building and maintaining them.

Given that large scale public registration systems are a novel concept within EU copyright law that nevertheless has the potential to significantly improve the functioning of the copyright framework under conditions of ever increasing digitization, the European legislator should closely monitor these developments and explore the potential of registration systems to achieve a truly modern copyright system. Ultimately such a system should offer a high level of copyright protection to rightholders who need it while reducing unnecessary barriers to accessing works that do not require the full protection of copyright.

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<sup>36</sup> Or one of its executive agencies like the EUIPO which as noted above does have substantial unused financial resources that could be employed for this purpose.